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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1215

SAMUEL LEIFER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Jurisdiction

Petitioner Samuel Leifer invokes this Court's jurisdiction under 28 U.S.C. §1257(3) in support of an application for certiorari to the New York Court of Appeals based upon a certificate entered November 9, 1979, by a single judge of that court, denying petitioner permission to appeal to the Court of Appeals from a decision of the Appellate Division, Second Judicial Department. As set forth in Point I of its argument, respondent submits that this Court

lacks jurisdiction because the Court of Appeals has not rendered a final judgment or decree within the meaning of 28 U.S.C. §1257.

Questions Involved

1. Whether a prosecutor may continue a grand jury investigation of, and procure a superseding indictment against, an individual who has offered to plead guilty to a pending indictment but has declined to cooperate with the prosecutor's investigation of other persons and matters; and if so, whether any objections to the felony indictment subsequently returned are waived by his plea of guilty to all the additional counts.

2. Whether the consent of informants to record their conversations with a prospective defendant is invalid, and the recordings rendered inadmissible under 18 U.S.C. §2510 or the Constitution, if the informants' consent was motivated by their desire to minimize the possible sanctions for their own criminal conduct.

3. Whether a search warrant procured in part upon information supplied by informants is rendered invalid, as a matter of Constitutional law, where the informants have cooperated in order to minimize the possible sanctions for their own criminal conduct.

4. Whether police officers executing a search warrant are obligated, under the Constitution, to display the warrant to every person on the premises in which the search is being conducted, whether or not their authority to conduct the search is questioned.

Statement of the Case

In 1975, the State of New York authorized its Attorney General to conduct an intensive civil and criminal investigation into the rampant corruption within the State's nursing home industry. *Sigety* v. *Hynes,* 38 N.Y.2d 260 (1975), *cert. denied sub nom. Kent Nursing Home* v. *Office of Special Prosecutor,* 425 U.S. 974 (1976). As part of that investigation, on November 9, 1976, a Kings County Grand Jury returned a 19-count indictment against petitioner, Samuel Leifer, an owner of the River Manor Health Related Facility. The indictment charged that from 1974 to 1976 Leifer had regularly received kickbacks, amounting to 25 per cent of the facility's purchases, from Frohlich and Newell Foods, Inc. R. 3-23, 201.* Frohlich and Newell, who faced potential criminal prosecution themselves, had cooperated with the investigation, consented to have their conversations with Leifer tape-recorded, and testified before the grand jury. R. 201-02, 355.

The grand jury's investigation of Leifer did not, and was not intended to, end with the return of that indictment. The filing of that instrument served to prevent the two-year statute of limitations on those misdemeanor charges from expiring while the investigation of various felony offenses continued. R. 266; *see* N.Y. Crim. Pro. L. §§1.20, subd. 17, 30.10, subd. 2 (McKinney's). The Attorney General's office immediately informed Leifer's attorneys that the grand jury's investigation was continuing and that a superseding indictment charging Leifer with more serious offenses was actively being contemplated. R. 266-67.

* "R." connotes the record on appeal to the Appellate Division, Second Department.

During the period immediately following the original indictment, a search warrant was obtained for a notebook which Newell described having seen Leifer use over the years to record the kickbacks which he received. R. 186, 198-99. On November 12, 1979, police officers successfully executed the search warrant at the same time they arrested Leifer on a separate arrest warrant based on the indictment. R. 259; *see* N.Y. Crim. Pro. L. §210.10, subd. 3.

Leifer's attorneys then approached the Attorney General's office and offered a plea of guilty to various misdemeanors. R. 243-44, 267. During the ensuing plea negotiations, the prosecutor asked whether Leifer would be willing to supply information about other corrupt individuals in the nursing home industry; this prospect was merely discussed among various possible dispositions and the prosecutor never made any firm offer to terminate the investigation and accept the misdemeanor plea in return for Leifer's cooperation. R. 156, 243-44, 267. Leifer steadfastly refused any cooperation, his offer of a misdemeanor plea was rejected, and the grand jury's investigation continued. R. 156, 244-45.

As the investigation progressed, various other vendors came forward to testify that they, too, had paid Leifer kickbacks. R. 270. A substantial quantity of subpoenaed books and records relating to Leifer's business, many of which he had previously resisted yielding, were introduced before the grand jury over the ensuing months. R. 268-69. Leifer's tax returns were eventually produced and, in October of 1977, the person who prepared them finally became available to testify. R. 269.

At that point, nearly one year after the original indictment, the grand jury's investigation concluded with the filing of a superseding indictment—which included 19 new felony counts charging the offering of false instruments for filing, the falsifying of business records, attempted grand larceny and a misdemeanor count of tax evasion, as well as the original counts of kickback-receiving.* R. 82-129, 269.

Leifer then moved to dismiss the superseding indictment on the ground, among others, that it was brought to "punish" him for not becoming an informant; in the alternative, he moved to suppress the tape recordings of his statements to Frohlich and Newell on the ground that his attorney believed that Frohlich and Newell did not voluntarily consent to the recording and to suppress the notebook on the ground that their lack of consent tainted the probable cause which existed for the search warrant. R. 34-36, 59-61. Upon the entry of an order denying the foregoing relief, without a formal opinion, Leifer entered a plea of guilty to all 39 counts of the indictment and was sentenced, on April 26, 1979, to a term of six month's imprisonment on each of the 19 felony counts, to be served concurrently, and to pay a fine of $1000 on each of the 20 misdemeanor counts. R. 296-502, 633-90. The judgment of conviction was unanimously affirmed, without opinion, by the Appellate Division, Second Department, on September 24, 1979 (71 A.D.2d 1007), and on November 9, permission to appeal to the New York State Court of Appeals was denied by Associate Judge Jacob D. Fuchsberg (48 N.Y.2d 802).

Petitioner is scheduled to be released from prison on March 12, 1980.

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* One additional kickback-receiving count was returned but dismissed on pretrial motion.

ARGUMENT

POINT I

Certiorari to the New York Court of Appeals does not lie in the absence of a final judgment or decree by that court.

Petitioner seeks a writ of certiorari to review what he contends is a final judgment of the New York State Court of Appeals entered November 9, 1979. The judgment to which he refers is merely a certificate, issued by a single judge, denying petitioner's application to appeal from the affirmance of his conviction by the Appellate Division. The grant or denial of such an application is, under section 460.20 of the New York Criminal Procedure Law, a matter within the sole discretion of the judge to whom the application is assigned and accordingly is not a "final judgment or decree" on the merits by "the highest court of the State in which a decision could be had" within the meaning of 28 U.S.C. §1257. *Interstate Circuit, Inc.* v. *Dallas,* 390 U.S. 676, 678, n. 1 (1968); *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U.S. 157, 160 (1954); *American Railway Express Co.* v. *Levee,* 263 U.S. 19, 20-21 (1923).

POINT II

The issues which petitioner seeks to raise are not presented by the record.

A. The State court explicitly found that the superseding indictment was not brought to punish petitioner for refusing to cooperate with the Attorney General's office.

Petitioner contends that the New York Attorney General unconstitutionally sought and obtained a superseding indictment against petitioner, based on the same evidence and for conduct originally charged as misdemeanors, in order to "punish" petitioner for refusing, on "religious grounds," to become an informant. Petition at 2-3, 12-15. His factual premises are unsupported by the record and are contrary to the explicit findings of the State court.

First, Leifer's contention that the second indictment was based on the same evidence, and charged the same conduct, as did his original indictment is wrong. The trial prosecutor, Special Assistant Attorney General Frank J. Marine, submitted statements to the State court, under oath, in which he not only denied that, but carefully chronicled for the court all the evidence of felonious conduct which became first accessible to the grand jury after the original indictment. R. 243-44, 266-70. This evidence included books and records, the testimony of various witnesses, and the "smoking gun"—the notebook in which petitioner recorded his illegal kickbacks. The superseding indictment itself supports Mr. Marine's affirmation: the additional charges are not, as petitioner implies, for receiving kickbacks but rather for the falsification of business rec-

ords, the submitting of false documents to the State, attempted larceny, and tax evasion. R. 82-103, 127-28.

Second, petitioner falsely contends that the superseding indictment was procured because he refused to become an informant. Mr. Marine also denied this under oath, emphasizing that the prosecutor always intended, and had told Leifer's attorneys "from the very beginning," that additional charges were being pursued with the view toward just such a superseding indictment. R. 243, 266. It was Leifer who tried to avoid this by offering to enter a misdemeanor plea. R. 243-44. Mr. Marine stated unequivocally that petitioner's cooperation with the investigation was never demanded as a condition of allowing him to enter such a plea, and that the prosecution sought the superseding indictment "not * * * to punish the defendant for his refusal to provide information about other corrupt individuals" but "because the evidence justifies the charges." R. 243-44. The hearing judge credited Mr. Marine's statements and found that the superseding indictment was not procured to punish petitioner for refusing to cooperate: "I do not believe it was punitive action taken on the part of the prosecutor * * *. I think he acted properly." R. 353.*

Moreover, as the hearing court noted, even assuming that the superseding indictment had been sought because

* Petitioner's contention that his refusal to cooperate was based on some unspecified "religious conviction" (petition at 14) was never addressed by the State court because Leifer's motion papers proffered no reason for his refusal to cooperate. R. 35, 156. Petitioner's "First Amendment" question (petition at 2-3) was thus never presented to or decided by the State courts. *Compare* R. 24, 396. Although counsel has no hesitation to go outside the record when it suits him (see petition at 6), he has yet to submit any proof that Leifer's religion requires him to protect other criminals.

appellant had rejected the prosecutor's entreaties during plea negotiation—instead of the other way around—no constitutional rights were violated. R. 341. In *Bordenkircher* v. *Hayes,* 434 U.S. 357 (1978), this Court held that a prosecutor may reindict a defendant for more serious charges, even upon the same conduct, because the latter refuses to plead guilty to the original charge. The Court held that "in the give and take of plea bargaining there is no element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." *Id.* at 363. Petitioner's attempt to distinguish *Bordenkircher* on the ground that that case "specifically recognized that the result would be different" if the defendant were asked to become an informant (petition at 13) is totally fanciful. What the Court noted in *Bordenkircher* was merely that that case did not invoke an offer of adverse or lenient treatment for some person other than the accused. *Id.* at 364 n. 8. Neither, obviously, does this one.

Finally, any objection to the superseding indictment as "punitive" was waived by petitioner's guilty plea to all the additional counts. In the absence of a statutory preservation, a guilty plea constitutes a "break in the chain of events which has preceded it in the criminal process" and "bars the later assertion of constitutional challenges to the pretrial proceedings." *Lefkowitz* v. *Newsome,* 420 U.S. 283, 289 (1975); *Tollett* v. *Henderson,* 411 U.S. 258, 267 (1973). There is not the slightest reason to believe that the State appellate court violated basic New York law on this point [*People* v. *LaRuffa,* 34 N.Y.2d 242 (1974), *cert. denied* 423 U.S. 917 (1975)] to credit petitioner's *ipse dixit* "reserving" of his appellate rights (petition at 11).

B. The State court found the informants' consent to the recording of their conversations with petitioner to have been established by uncontroverted evidence.

The petitioner next contends that the Constitution places upon the States the burden of proving that an informant consented to have his conversation with the defendant recorded. Petition at 15-19. This issue was never squarely presented to the courts below, at least as a matter of Constitutional law, and the hearing court found no necessity to apportion the burden of proof because:

> Everything that's been presented to me, and there's no evidence to the contrary whatever, except mere speculation, everything that's been presented to me indicates that the special agents, as you call them, informants, whatever, voluntarily participated in this matter. I have not the slightest indication that their cooperation was less than voluntary. The fact that they were faced with hard choices, people are facing every day.

R. 357. The evidence to which the court was referring was, evidently, Newell and Frohlich's testimony before the grand jury; Newell's affidavit, which stated that he was cooperating when he wore the recording device; and Mr. Marine's statement, under oath, confirming this. *See* R. 185, 259, 354-56.

In contrast, all that appellant submitted was a statement by one of his attorneys of her "belief" that the informants did not consent, solely "based on the fact that Newell and Frolich were caught by the prosecutor while participating in a rebate scheme with various nursing homes they supplied." R. 60. As the hearing court recognized, this fact would in no way negate consent: "Perhaps, had they not

[consented], they might have been subject to certain sanctions with regard to their own behavior, perhaps, but they had a choice. * * * They acted on advice of counsel." R. 355. Thus neither an evidentiary hearing nor the fixing of the burden of proof thereat was necessary: the court was willing to assume that Newell and Frohlich were motivated for the reason petitioner alleged and to resolve the purely legal question whether such a motive vitiates consent.

The court properly answered that question in the negative. Self-interest is hardly incompatible with voluntariness. *See, e.g., United States* v. *Hodge,* 539 F.2d 898, 904-05 (6th Cir. 1976) *cert. denied sub nom. Robertson* v. *United States,* 429 U.S. 1091 (1977) (hope of leniency); *United States* v. *Silvia,* 449 F.2d 145 (1st Cir. 1971) *cert. denied* 405 U.S. 918 (1972) (promise of leniency; *see, also, United States* v. *Horton,* 601 F.2d 319, 321-22 (7th Cir. 1979) and cases in the 4th, 5th and 6th circuits cited thereat (favorable sentence recommendations, payments, protective custody, etc).

Petitioner, however, seemingly urges that the State must show consent to have been utterly spontaneous, if not altruistic, and that the proper analogy is to the waiver of a basic constitutional right. Petition at 18. But, as Judge Friendly has explained, the burden of showing an informant's consent, even if it is to be placed on the prosecution, is an "easy" one to meet precisely because the self-interest of the informant makes his consent "very different" from a defendant's waiver of a constitutional right:

> [T]he extent of proof required to show that an informer consented to the monitoring or recording of a telephone call is normally quite different from that

> needed to show consent to a physical search, whether by the defendant himself or by some person in a position to give an effective one. In cases involving physical search, the person alleged to have consented is doing something apparently contrary to his own interests or to those of another who often is in some way connected with him. An informer's consent to the monitoring or recording of a telephone conversation is an incident to a course of cooperation with law enforcement officials on which he has ordinarily decided some time previously and entails no unpleasant consequences to him.

Thus, the court held, the government is not obligated to show anything more than "that the informant went ahead with a call after knowing what the law enforcement officers were about." *United States* v. *Bonanno,* 487 F.2d 654, 658-59 (2d Cir. 1973). The record here unequivocally shows that Frohlich and Newell "went ahead" knowing they had something to gain and nothing to lose by becoming informants. It may well be that they would not have done so had they not themselves been caught by the prosecutor, but the Constitution* simply does not require that their motives be pure.

C. The evidence seized pursuant to the search warrant was not the fruit of the recorded conversations.

Petitioner next contends that the notebook should have been suppressed because the warrant which authorized its seizure was based on the supposedly involuntarily recorded conversations. Petition at 19-20. In fact, it was based on an affidavit by Newell, who swore that he had been paying

* Petitioner now also invokes 18 U.S.C. §2510 (petition at 3, 20), never having done so in the State courts (*see* R. 28). In any event, the statute does not affect the principles cited above.

Leifer kickbacks every month since the middle of 1974, and had seen Leifer record those kickbacks into his notebook on "almost every occasion" during those years; Newell knew the location of the notebook and described it in detail in his affidavit. R. 184-87. Newell had consented to wearing a recording device only on September 3 and November 3, 1976, and the supplementary affidavit of a police officer who monitored these tapes merely confirmed a part of what Newell swore of his own person knowledge. R. 185, 186, 188-90. Thus, there was, and can be, no contention that Newell's affidavit was the fruit of the taped conversation, and therefore even if he had not consented to the recording the application for the warrant was amply supported by untainted probable cause. *Wong Sun* v. *United States,* 371 U.S. 471, 491 (1963).

D. The failure to physically serve the warrant was not raised as a ground for suppression.

Finally, petitioner contends that the police officers who executed the warrant for the notebook acted unconstitutionally in not displaying the search warrant to Leifer and his receptionist. Petition at 20-21. In moving to suppress the introduction of the kickback book, petitioner never contended that the manner in which the warrant was executed violated either the Constitution or any statute. *See* R. 61. Even on appeal, he contended merely that there was a violation of New York Crim. Pro. L. §690.50 (brief at 37-38) but, as respondent pointed out in the Appellate Division, that statute requires that a police officer executing a warrant merely "give notice of his authority and purpose" to an occupant of the premises, and that he physically display the warrant only "upon request." *Id.* at subd. 1. Petitioner

never disputed that the police properly identified themselves to him* and conceded that they told him that they had a search warrant. R. 240. There is no allegation that anyone asked to see the warrant and no contention that the statute is unconstitutional. Thus there is no reason for this Court to grant certiorari to consider, for the first time, whether the Constitution requires not merely that a search warrant be based on probable cause (U.S. Const. Amend. IV), but that it must also be thrust in the face of anyone who happens to be present when it is executed.

Conclusion

The petition should be denied.

Respectfully submitted,

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* Petitioner did allege that the police initially deceived his receptionist in order to gain access to Leifer personally and to the office in which the evidence was located. R. 240. As noted above, petitioner's motion to suppress alleged no impropriety in the execution of the warrant. R. 61. Assuming that the State court, sua sponte, addressed the issue, it presumably held either that the statute did not require that the receptionist be given adequate warning to alert her employer—and enable him to flee or destroy the evidence; or else that no right of his was violated.